

<sup>3</sup> The Board notes that, following the October 16, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$81,160.62 for the period July 24, 2016 through April 28, 2018 because he continued to receive wage-loss compensation after he returned to work; and (2) whether OWCP properly found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On May 11, 2012 appellant, then a 45-year-old laundry machine operator supervisor, filed a traumatic injury claim (Form CA-1) alleging that on May 8, 2012 he experienced pain between his shoulder blades when tugging on laundry cart stuck in the doorway while in the performance of duty. He stopped work on May 9, 2012. OWCP accepted the claim for neck sprain; sprain of the right shoulder and upper arm, rotator cuff; and right brachial neuritis or radiculitis not otherwise specified.<sup>4</sup> It paid appellant wage-loss compensation for total disability on the supplemental rolls as of July 1, 2012 and on the periodic rolls as of July 29, 2012.

Appellant returned to full-time modified-duty work on September 5, 2013, but stopped work again. On May 28, 2014 he underwent a right shoulder subacromial decompression with partial acromioplasty. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning that date.

In an October 9, 2014 letter, OWCP advised appellant that he would be receiving wage-loss compensation on the periodic rolls beginning October 19, 2014 and outlined his entitlement to compensation benefits and his responsibility to return to work in connection with her accepted injuries. In an attached Form EN1049, it further provided: “[t]o minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK.... For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every two weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.” (Emphasis in the original.)

In a Form EN1032 dated May 17, 2017, appellant advised that he had returned to “[l]ight office work” on August 12, 2016 at the employing establishment.

On May 21, 2018 OWCP requested that the employing establishment address whether appellant had resumed work and, if so, provide the date of his return, the hours worked each day, and his rate of pay.

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<sup>4</sup> OWCP previously accepted that appellant sustained a lumbar sprain under File No. xxxxxx398. It has administratively combined that claim with the present claim, assigned File No. xxxxxx993, with File No. xxxxxx398 serving as the master file.

In a May 23, 2018 response, the employing establishment advised that appellant had resumed work full time for 40 hours per week on July 24, 2016 while also receiving compensation from OWCP.

In a May 24, 2018 manual adjustment form, OWCP noted that appellant had returned to full-time work on July 24, 2016, but had been paid wage-loss compensation through April 28, 2018. It noted that he received a net payment of \$20,984.64 from July 24, 2016 through January 7, 2017; \$3,464.36 from January 8 through February 4, 2017; \$3,476.07 from February 5 through March 4, 2017; \$39,009.96 from March 5, 2017 through January 6, 2018; \$3,508.46 from January 7 through February 3, 2018; \$3,518.21 from February 4 through March 3, 2018; and \$7,198.42 from March 4 through April 28, 2018. The payments resulted in a total overpayment of compensation in the amount of \$81,160.62.

On August 23, 2018 OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$81,160.62 for the period June 24, 2016 through April 28, 2018 because he returned to full-time employment on June 24, 2016, but received wage-loss compensation for total disability through April 28, 2018. It further notified him of its preliminary finding that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known, was incorrect. Additionally, OWCP informed appellant that, within 30 days, he could request a telephonic conference, a final decision based on the written evidence, or a precoupment hearing. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

In an overpayment action request form dated August 31, 2018, appellant requested waiver of recovery of the overpayment. He maintained that he had informed OWCP by telephone on two occasions that he had resumed work. Appellant related that he believed that the continued payments that he had received were for a schedule award. In an accompanying OWCP-20, he advised that he had \$31,971.93 in funds, monthly income of \$3,476.00, and monthly expenses of \$2,848.00.

By decision dated October 16, 2018, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$81,160.62 for the period July 24, 2016 through April 28, 2018 as he returned to work on July 24, 2016, but received compensation benefits for total disability through April 28, 2018. It determined that he was at fault in the creation of the overpayment because he accepted compensation payments which he knew or should have known were incorrect. OWCP found that appellant should forward \$81,160.62 within 30 days to repay the overpayment of compensation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or

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<sup>5</sup> 5 U.S.C. § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>6</sup>

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.<sup>7</sup> OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$81,160.62 for the period July 24, 2016 through April 28, 2018 because he continued to receive wage-loss compensation for total disability after he returned to work.

Appellant resumed full-time employment on July 24, 2016. OWCP, however, continued to pay him wage-loss compensation for total disability following his return to work, which resulted in an overpayment of compensation. Appellant was not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>9</sup>

In determining the amount of overpayment, OWCP calculated the net amount of disability compensation that appellant had received from July 24, 2016 through April 28, 2018. Thus, the Board finds that he received an overpayment of compensation in the amount of \$81,160.62 during the above-noted period.<sup>10</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides as follows that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.<sup>11</sup> No waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.<sup>12</sup>

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<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8116(a).

<sup>8</sup> *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

<sup>9</sup> *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *S.N.*, Docket No. 19-1018 (issued November 12, 2019).

<sup>10</sup> *See R.Q.*, Docket No. 18-0964 (issued October 8, 2019).

<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>13</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment from July 24 through August 20, 2016.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.<sup>15</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>16</sup> Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFT is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>17</sup>

Appellant returned to work on July 24, 2016. OWCP paid him compensation for the period July 24 through August 20, 2016 in a direct deposit payment on August 20, 2016. There is no documentation to demonstrate that appellant had clear knowledge at the time the bank received the August 20, 2016 direct deposit that the payment was incorrect.<sup>18</sup> The Board thus finds that he was without fault in accepting the initial direct deposit covering the period July 24 through August 20, 2016.

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<sup>13</sup> 20 C.F.R. § 10.433(a).

<sup>14</sup> *Id.* at § 10.433(b).

<sup>15</sup> *See C.H.*, Docket No. 19-1470 (issued January 24, 2020); *see also Claude T. Green*, 42 ECAB 174, 278 (1990).

<sup>16</sup> *C.H., id.*; *see Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> *See K.E.*, Docket No. 19-0978 (issued October 25, 2018).

The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment from August 21, 2016 through April 28, 2018.

Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.<sup>19</sup> In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, a claimant will be at fault for accepting the payments subsequently deposited.<sup>20</sup> By the time of the second payment, appellant should have known that he was not entitled to the same amount of wage-loss compensation as he had received prior to his return to work on July 24, 2016.<sup>21</sup>

In an EN1049 form dated October 9, 2014, OWCP advised appellant that an overpayment would be created if he returned to work, but continued to receive wage-loss compensation. It informed him that he should monitor his EFT deposits carefully, and immediately advise OWCP if he worked for any portion of the period for which a deposit was made. Therefore, by the time appellant received the second direct deposit on September 17, 2016, covering the period August 21 to September 17, 2016, he knew or should have known that the continued payment was incorrect. The Board therefore finds that OWCP properly found that he was at fault in the creation of the overpayment from August 21, 2016 through April 28, 2018.

On appeal appellant contends that he was unaware that he was receiving an overpayment of compensation. He asserts that he had telephoned OWCP advising of his return to work and had also returned a questionnaire indicating that he had resumed work. As explained above, however, OWCP clearly informed appellant that he was not entitled to wage-loss compensation for the same period that he returned to work. Thus, appellant should have been aware that he was not entitled to compensation as of the date of his return to work. The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.<sup>22</sup> While appellant contends that he believed that the payments were for a schedule award, OWCP has not granted him a schedule award.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$81,160.62 for the period July 24, 2016 through April 28, 2018 because he continued to receive wage-loss compensation after he returned to work. The Board further finds that he was without fault in the creation of the overpayment from July 24 through August 20, 2016, but was at fault in the creation of the overpayment for the period August 21, 2016 through April 28, 2018. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period July 24 through August 20, 2016.

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<sup>19</sup> *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *see C.G.*, Docket No. 15-0701 (issued December 9, 2015).

<sup>20</sup> *See L.T.*, *supra* note 9.

<sup>21</sup> *Id.*

<sup>22</sup> 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 18, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board